IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 13, 2009

KENT GARY TISCHER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Cannon County
No. PC08-36 Robert E. Corlew, III, Judge

No. M2008-01247-CCA-R3-PC - Filed July 14, 2009

The Petitioner, Kent Gary Tischer, appeals as of right the Cannon County Circuit Court's denial of his petition for post-conviction relief. The Petitioner alleges that his guilty pleas to two counts of aggravated vehicular homicide, Class A felonies, were not voluntarily, knowingly, and understandingly made due to the ineffective assistance of counsel. Specifically, he contends that he was not able to consult with his newly appointed co-counsel prior to the sentencing hearing, thereby prohibiting him from making an informed decision to plead guilty. After the appointment of counsel and a full evidentiary hearing, the post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence and denied the petition. Following our review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P; 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Jerry W. Matthews, Woodbury, Tennessee, for the appellant, Kent Gary Tischer.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; William Whitesell, District Attorney General; and David L. Puckett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner pleaded guilty, as a Range I, standard offender, to two counts of vehicular homicide and two counts of aggravated vehicular homicide. See Tenn. Code Ann. §§ 39-13-213, -218. The remaining charges of driving under the influence of an intoxicant (DUI), DUI per se, and violation of the open container law were dismissed. See Tenn. Code Ann. §§ 55-10-401, -416.

Pursuant to the terms of the negotiated plea agreement, the length of the Petitioner's sentences and the manner of service were left to the discretion of the trial court.

At the August 23, 2007 guilty plea hearing, the State provided the facts supporting the Petitioner's pleas: On December 18, 2005, at approximately 5:40 p.m., an automobile crash occurred on Bradyville Road, Highway 54. The Petitioner was driving a silver Volkswagen—David Whittemore was in the front passenger seat, and Jerry Baker was in the backseat. The vehicle crossed over the center line and struck a red Ford pickup truck. Bystanders could smell alcohol emitting from the vehicle, and the Petitioner was photographed inside the vehicle with a beer can between his legs. Other beer cans were observed inside the vehicle, both in the front and the back of the car. Two hours and nine minutes after the crash, the Petitioner's blood alcohol content was determined to be .13 percent. Mr. Whittemore was dead before emergency personnel arrived on the scene, and Mr. Barker later died as a result of his injuries sustained in the crash. The Petitioner, who had three prior DUI convictions, also suffered extensive injuries.

A sentencing hearing was held on October 12, 2007, and the vehicular homicide convictions were merged into the Class A aggravated vehicular homicide convictions. The court heard testimony from Mr. Whittemore's daughter, Mr. Barker's sister, and Lieutenant Brad Hall of the Cannon County Sheriff's Department, who responded to the crash. In imposing sentence, the trial court noted that counsel "ably argued" the circumstances of the offense: that the victims knew they were getting into a car with someone who had been drinking and that the Petitioner had not previously been involved in a prior accident resulting in a fatality. Nonetheless, the trial court found that the Petitioner's prior history of criminal convictions was sufficient to support concurrent sentences of twenty-five years.

The Petitioner filed a petition for post-conviction relief on January 28, 2008. Counsel was appointed for the Petitioner, and an amended petition was filed. The Petitioner asserted that his new co-counsel was ineffective due to his failure to communicate with the Petitioner prior to the sentencing hearing and, thus, he was not sufficiently advised to make an informed decision. A hearing was held on April 25, 2008, at which the Petitioner, lead counsel, former co-counsel at trial, and new co-counsel at the sentencing hearing testified.

The Petitioner stated that the first lawyer appointed for him was Mr. Kenneth McKnight, who was followed by Mr. Dale Peterson. Ultimately, Mr. William H. Bryson (lead trial counsel) and Edward L. Holt, Jr. (former co-counsel) counseled the Petitioner during his pre-trial proceedings, which culminated in his guilty pleas. Following his pleas, Mr. Holt changed jobs and was replaced by Mr. Darwin K. Colston (new co-counsel) to assist Mr. Bryson with the sentencing hearing.

When asked about meetings with his attorneys, the Petitioner testified that he met with Mr. Bryson and Mr. Holt but that he only met Mr. Colston on the day of sentencing. He met with Mr. Byrson at least two or three times. He asserted that he sent Mr. Bryson and Mr. Holt letters but that they did not respond. The Petitioner claimed that he did not know Mr. Colston was his new co-counsel until he met him at the sentencing hearing. According to the Petitioner, neither Mr. Bryson

nor Mr. Holt met with any of the potential witnesses in the case because they would not listen to him, and he often disagreed with Mr. Bryson and Mr. Holt. The Petitioner acknowledged that Mr. Bryson and Mr. Holt informed him of the potential sentence he was facing if he took the case to trial. He claimed he took the plea deal because he "was under the impression . . . that the minimum was at 8 to 12 on both charges."

The Petitioner then relayed the multiple injuries he suffered in the crash: a fractured spine; two skull fractures; multiple fractures to his face and ribs; a broken foot; loss of balance, hearing, taste, and smell; and injuries to his shoulder and hand. The Petitioner believed these injuries affected his decision-making abilities, although he did not remember talking to his attorneys about any mental problems.

The Petitioner testified that, if presented with the same decision to plead guilty to two counts aggravated vehicular homicide, he would have not entered the pleas. When asked why he would no longer have pleaded guilty, the Petitioner responded that he wanted to have his "side" told and present witnesses to support his story. He believed that, had he been able to meet with Mr. Colston, he could have expressed his ideas about the case and he would have "probably had a different turnout." He was forced to plead guilty due to the "underperformance" of Mr. Bryson and Mr. Holt.

On cross-examination, the Petitioner admitted that he entered his pleas on the day his case was set for trial and that his attorneys were prepared to proceed with a trial. He acknowledged that, at the guilty plea hearing, he affirmatively stated that he was satisfied with his attorney's investigation of the case, that he was voluntarily pleading guilty, and that no one forced him to plead guilty. He was also aware of the nature of the charges against him and reviewed the plea documents with his attorneys, affixing his signature thereto.

Finally, the Petitioner confirmed his prior criminal history, which included three felony convictions (one for aggravated criminal sexual abuse with a weapon and two for aggravated criminal sexual abuse) and three prior DUI convictions. The presentence report, included in the record on appeal, also reflects misdemeanor convictions for driving on a revoked license, simple possession of marijuana, worthless checks, and vandalism. The Petitioner qualified for sentencing as a Range II, multiple offender, which would carry a sentence for twenty-five to forty years for a Class A felony. Moreover, it was noted that none of the witnesses claimed to be of benefit to the Petitioner's case were called at the post-conviction hearing.

William H. Bryson then testified that he was lead trial counsel for the Petitioner. He believed that he met with the Petitioner on three or four occasions. While the Petitioner did give him names of potential witnesses, they were out-of-state family members unhelpful to his case, having no knowledge about the facts of his case. The Petitioner did not provide any information that would support an alternate theory of what happened.

Mr. Bryson testified that he timely conveyed the plea offers to the Petitioner. He estimated that he worked on the Petitioner's case for probably twenty-five or thirty hours. Although Mr.

Bryson did not file any motions in the case, he did extensively review the discovery materials provided by the State. Mr. Bryson met with co-counsel, Mr. Holt, four times to discuss the case. Mr. Bryson did not inform the Petitioner that Mr. Holt had been relieved as co-counsel after Mr. Holt found another job.

According to Mr. Bryson, the Petitioner expressed an interest in taking the case to trial. They were prepared to take it to trial when the Petitioner made the decision to accept the plea offer.

On cross-examination, Mr. Bryson opined that the evidence (a blood alcohol content of .13 percent two hours after the accident, a picture of a beer can between the Petitioner's legs, and at least two prior DUI convictions) was overwhelming against the Petitioner. Mr. Bryson confirmed that the State had filed a notice to seek a Range II sentence. Moreover, Mr. Bryson was successful in seeking concurrent, rather than consecutive, terms at the sentencing hearing.

Darwin K. Colston testified that he assisted Mr. Bryson with the Petitioner's case following Mr. Holt's departure from their law firm. Mr. Colston's involvement "basically was second chairing with Mr. Bryson for the sentencing hearing only." He met the Petitioner for the first time on the day of the sentencing hearing; he had just two or three weeks to prepare. According to Mr. Colston, he met with Mr. Bryson to discuss the case and also talked with Mr. Holt by telephone, spending two hours or less on familiarizing himself with the case. Mr. Colston did not file any motions on the Petitioner's behalf, and he did not discuss the facts of the case with the Petitioner in any regards except sentencing.

On cross-examination, Mr. Colston stated that his job at the sentencing hearing was to be Mr. Bryson's "eyes and ears." Mr. Colston confirmed that Mr. Bryson had been working on the Petitioner's case for some time.

Mr. Edward L. Holt, Jr. then testified. He relayed that he worked with Mr. Bryson on the Petitioner's case and reviewed the evidence. During his representation of the Petitioner, he met with the Petitioner twice, and Mr. Bryson was present during these meetings. They advised the Petitioner against taking the case to trial. He did not remember filing any motions on the Petitioner's behalf and believed he worked more than twenty hours on the case. He was relieved from his representation of the Petitioner when he left his law firm and went to work for the Inspector General's Office. He was not aware that anyone was appointed in his stead. Mr. Holt testified that he did not meet with Mr. Bryson or Mr. Colston when the change in representation occurred. Mr. Holt further testified that he did not discuss the case with Mr. Colston.

On cross-examination, Mr. Holt also opined that the evidence was overwhelming against the Petitioner. He believed it "was a huge victory" for the Petitioner when they negotiated for a Range I sentence. Following his departure, Mr. Holt understood that Mr. Bryson continued to represent the Petitioner.

After hearing the evidence presented, the post-conviction court denied relief. The post-conviction court ruled that the Petitioner had not satisfied his burden of proving that any of his counsel were ineffective, noting the overwhelming evidence against the Petitioner in this case and the extensive investigation done by Mr. Bryson and Mr. Holt prior to the Petitioner's guilty pleas. The post-conviction court further determined that the Petitioner's sentence "was certainly in order." An order was entered to this effect on June 9, 2008. This appeal followed.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in denying him relief because his new co-counsel was ineffective at the sentencing hearing. Specifically, he alleges that he did not receive the effective assistance of counsel because his new co-counsel never discussed "his views on the case" with the Petitioner prior to sentencing, and had his new co-counsel done so, the sentencing outcome would have been different. He requests that his plea be set aside and that the case be remanded for a new trial.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. Hill v. Lockhart, 474 U.S. at 56 (citing North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970)).

When a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must "canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s]." Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, "(a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea." Mackey, 553 S.W.2d at 341.

However, a trial court's failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to seek post-conviction relief. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specified constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). "Whether the additional requirements of Mackey were met is not a constitutional issue and cannot be asserted collaterally." Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

Here, the Petitioner alleges that counsel was constitutionally deficient because he "never had the benefit of Attorney Colston's counsel before his sentencing hearing." As for prejudice, the Petitioner submits that, had he been able to confer with his new co-counsel, counsel would have discovered that Petitioner was suffering from severe injuries at the time he entered his plea, and that, with this information, the outcome of his sentencing would have been different.

As noted by the post-conviction court and the Petitioner's attorneys at the post-conviction hearing, the evidence in this case was overwhelming against the Petitioner. Approximately two hours and nine minutes after the crash, the Petitioner's blood alcohol content was .13 percent. Bystanders could smell alcohol emitting from the Petitioner's vehicle, and the Petitioner was photographed on the scene with a beer can between his legs. The Petitioner had three prior DUI convictions, and the victims died as a result of the accident. If convicted by a jury, the Petitioner faced sentencing as a Range II, multiple offender, carrying a range of twenty-five to forty years for a Class A felony.

Both Mr. Bryson and Mr. Holt testified that they reviewed the discovery in the case, met with the Petitioner, and discussed the facts of the case with him. Mr. Bryson testified that the Petitioner could not provide a version of events differing from the State's theory of the case. While they counseled the Petitioner against going to trial, they were prepared to try the case. The potential witnesses provided by the Petitioner were family members with no knowledge about the facts of the case. Ultimately, it was the Petitioner's decision to accept the plea offer.

Mr. Bryson represented the Petitioner throughout his trial proceedings, which culminated with his guilty pleas, and then continued to represent the Petitioner through the sentencing hearing. As noted by the post-conviction court, Mr. Bryson "ably argued" that the Petitioner should receive

concurrent, rather than consecutive, sentences, and concurrent sentencing was imposed. Mr. Colston was operating only as Mr. Bryson's "eyes and ears" at the sentencing hearing. Moreover, we note that, at the sentencing hearing, the following colloquy took place:

> THE COURT: We'll let the record reflect the presence then of the General and counsel for [the Petitioner]. . . .
>
> Mr. Colston, I believe, again, this is a case where Mr. Holt was involved as counsel. I believe Mr. Holt had been appointed by the [c]ourt. Have you familiarized yourself with [the Petitioner's] case, and are you in a position then to assist Mr. Bryson then in the motions here today?
>
> MR. COLSTON: Yes, Your Honor. Mr. Bryson and I have had a chance to discuss this matter.
>
> THE COURT: Very well.

In this case, the trial judge did advise and question the Petitioner as mandated by Mackey. The guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions. The Petitioner was asked if he had any complaints about trial counsel, and he answered in the negative. The Petitioner also affirmed that he had not been forced or coerced into pleading guilty. To be sure, the record reflects the Petitioner knew and understood the options available to him prior to the entry of his guilty plea including the right not to plead guilty and demand a jury trial, and he freely made an informed decision of that course which was most palatable to him at the time.

The Petitioner has failed to show that Mr. Bryson and Mr. Holt did not adequately investigate his case or advise him as to his pleas. He also has not provided any evidence, other than his own testimony, that his injuries affected his decision-making process. The Petitioner has not shown how any further advice from Mr. Colston at sentencing would have affected the outcome of the sentencing hearing. The evidence does not preponderate against the findings of the post-conviction court. In consequence, the Petitioner has failed to establish that his guilty pleas were not knowing or voluntary or that he was denied the effective assistance of counsel.

CONCLUSION

Based upon the foregoing, we conclude that the post-conviction court did not err by denying post-conviction relief. Accordingly, we affirm the judgment of the Cannon County Circuit Court.

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DAVID H. WELLES, JUDGE